

Fair Political Practices Commission
Memorandum

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Approval of 2003 Regulatory Priorities

Date: September 20, 2002

This memorandum outlines the staff's recommendations for the Commission's priorities in CY2003. Historically, this first discussion memorandum presents the recommendations in narrative form. Generally, the final memorandum, in December, will show the proposed regulations on a chronological table. However, we have provided a tentative graphic table for the Commission's consideration. The rulemaking/project calendar is attached as **Appendix 1**.¹

Staff has been mindful of the current fiscal situation as well as the Commission's desire to limit the regulation calendar to items that are of the utmost urgency. This reduced regulation calendar reflects the Commission's directives in this area. In addition, the staff requests that the Commission approve or disapprove each of the recommendations and the priority at which they are set. Based upon those decisions, the staff can return in December 2002, with a formal calendar on which the Commission may take final action. It is staff's belief that, at the most, we will only be able to address first and second priority items. This is in part due to the reduced resources, but also in part due to other nonregulatory duties of the Commission that staff will be working on during the upcoming year. For example, the staff anticipates significant work on campaign manuals in order to update them for the new Proposition 34 environment. Commission staff will also continue to work on advice letters, opinions, and various outreach projects (adding to the web site, developing fact sheets, etc.) which are part of the regular work load of the agency and involve significant time commitments.

The table reflects the proposed pre-notice hearings and adoption hearings that are customarily held in connection with each regulatory project. In addition, customarily, the Commission staff holds "interested persons" meetings. All of these steps are labor intensive. The Commission's staff recommends that the Commission forgo the interested persons meetings and the pre-notice discussion stage for CY2003. Staff requests that flexibility be given to staff to determine which special circumstances warrant additional public meetings. If the Commission accepts this staff recommendation, the December calendar will reflect adoption hearings only (currently **Appendix 1** reflects pre-notice discussion which will be deleted). A similar proposal

¹ You will note that the chart shows no items for the February meeting. Staff requests this month to begin research on the new projects and to allow training time for new Commissioners.

was made to the Commission in 1999. (See excerpt from *Staff Memorandum "Pre-notice Discussion on Deadlines for Submitting Documents to the Commission"* attached at **Appendix 2.**)

As in prior years, the rulemaking plan will also allow for quarterly review and revision and will attempt to spread the workload as evenly as possible throughout the year, noting some nonregulatory projects as well. This year's plan sets out the proposed items (25 projects with several projects potentially involving more than one regulation) under general categorical headings with the priority rating that staff recommends included.

I. STATUTORILY² OR OTHERWISE REQUIRED CHANGES

Section 87302.6: Newly Created Boards and Commissions

[First Priority]

Section 87302.6 will be added to the Act effective January 1, 2003. (Chapter 264, Stats. 2002.) That section will require members of boards and commissions of newly created state and local agencies to file statements of economic interests in the same manner as officials covered by section 87200 until the agency has an approved conflict of interest code. Section 87302.6 does not specify where these statements will be filed and staff recommends that the Commission adopt a regulation to clarify the place of filing. It may be necessary to adopt a regulation on an emergency basis.

Regulation 18452. CalPERS' Reporting Requirements.

[First Priority, if Necessary]

Section 84225 requires candidates for the Board of Directors of CalPERS to file certain campaign reporting statements. Regulation 18452, as directed by statute, sets forth the filing schedule and describes the contents of those statements. CalPERS prepared an election schedule that provided for runoff elections under certain circumstances, requiring amendment of regulation 18452, since the regulation makes no provision for the filing of statements required by law during runoff election cycles. CalPERS' regulation authorizing runoff elections was successfully challenged in court, making amendment of regulation 18452 unnecessary.

However, CalPERS Board of Directors has appealed that adverse decision. If it receives a favorable ruling prior to next years election, the CalPERS Board will adopt an election schedule providing for a runoff election, which would require amendment of regulation 18452. Therefore, this regulation has been placed on the calendar in preparation for possible runoff elections that may occur in the event of a favorable outcome of CalPERS' appeal, in the event that decision is handed down prior to next year's election. Please note, this item was previously considered at a pre-notice stage and has been noticed for adoption. Therefore, we are scheduling it for an adoption hearing only.

² Copies of the legislation creating the need for the regulatory action are attached at **Appendix 3**. All references are to the Government Code unless otherwise indicated.

Regulation 18702.1 (AB 1797): Declaring a Conflict of Interest [First Priority]

This bill would require that a public official who holds an office specified in section 87200 and who has a financial interest in a decision publicly identify the financial interest giving rise to the conflict of interest, recuse himself or herself from discussing and voting on the matter, and leave the room until after the discussion, vote, and other disposition of the matter is concluded, except as specified. Regulation 18702.1(a)(1) may need amendment to define exactly what must be disclosed about the financial interest that qualifies as “in detail sufficient to be understood by the public.” Further, subdivision (a)(4) may need amendment to clarify that the public official can only speak as a member of the general public, and not as representative of his agency or clients. This requirement could be added back into the regulations through an amendment to step two (regulation 18702, et seq.), which is where it was located previously. Another option would be to add it to the end of the eight-step process when the public official has determined that he or she does indeed have a conflict (i.e. regulation 18709).

Section 87103.5 (AB 2366): Retail Merchants’ [First Priority]
“Public Generally” Exception

This bill added new subsections (b) and (c) to section 87103.5. Subsection (b) adds an alternative method to determine when income received from a customer does not meet the threshold to become a financial interest. Specifically, with respect to a jurisdiction with a population of 10,000 or less that is located in a county with 350 or fewer retail businesses, this exception applies if the amount of income received by the business entity from the customer does not exceed one percent of the gross sales revenue of the business entity.

Regulation 18707.5, which pertains to existing section 87103.5 (copy attached at **Appendix 4**), will need revision. Currently, it gives definitions and lays out the way to apply the section 87103.5 procedure. However, the first part of the regulation (subsection (a) and the note below it) would only apply to the new subsection (a) of the statute and would need modification to apply to subsection (b). Subsection (b) of the statute would still apply to the entire statute section, but the “have reason to know” section of subsection (c) would need to be reevaluated to determine if the assumption is still valid under the new statute.

II. ON-GOING PROJECTS

The agendas for the early months of the year are generally filled with the adoption hearings for regulations considered at the pre-notice stage in the 4th quarter of 2002 and other carry-over items. Several items were started or raised in CY2002 and their resolution is recommended as a first priority item.

Proposition 34 Update. [Second Priority]

At the outset of its implementation of Proposition 34, the Commission made a conscious decision to interpret the measure through the public rulemaking process rather than through

advice letters. In the year and a half since Proposition 34 was enacted, the Commission has adopted or amended over 40 regulations and issued two opinions relating to its provisions. In addition, the Commission made several major policy decisions, first pertaining to the campaign reporting requirements under the new law, then focusing on discrete areas such as outstanding net debt, transfers, carry over, and expenditure limits.

The Commission's work has been quickly implemented as campaign contribution limits and the new disclosure requirements of Proposition 34 took effect at the statewide level in the March primary election. It is too soon to tell what additional major policy issues will be raised by full implementation of Proposition 34 in the November General Election. November 2002 is the first general election to which these provisions apply. Staff anticipates that there will be a need for further review of the implementation of Proposition 34. Consequently, we have incorporated general updates in the calendar and we expect that there will be regulatory projects growing out of these updates.

Regulation 18428: Affiliated Entities

[First Priority]

Regulation 18428 addresses the disclosure and notification requirements of affiliated entities that participate in the financing of elections. (§ 84211.) Originally, regulation 18428 implemented the Commission's *Kahn* ((1976) 2 FPPC Ops. 151) and *Lumsdon* ((1976) 2 FPPC Ops. 140) opinions requiring a "combination of persons" file one campaign statement. The regulation defined "affiliated entities" as "a person or group of persons whose campaign contributions are directed and controlled by another." Further work concerning the disclosure requirements is needed. Amendments to Form 460 are anticipated.

Regulation 18425: Late Contributions; Reports

[Third Priority]

Regulation 18425(b) allows an estimated amount of late contributions to be disclosed when more than one nonmonetary contribution will be made to a single candidate or received from a single contributor during the late contribution period. If the actual amount made or received differs by 20 percent or more, the candidate or committee must file an amended late contribution report.

Proposition 34 added Section 85309(a) and (b), which requires state candidates and ballot measure committees to file a report within 24 hours if a contribution of \$1,000 or more is received during the 90-day election cycle prior to the election of the candidate or ballot measure. The Commission has been asked to consider amending regulation 18425 to also allow disclosure of estimated information on the 90-day contribution reports. The Commission also may wish to consider amending the regulation or adopting a new regulation allowing disclosure of estimated information for late independent expenditures and the independent expenditure reports required during the 90-day election cycle under section 85500.

Conflict of Interest and General Plans.

[Second Priority]

Some agencies are viewing general plan amendments as coming within the purview of “zoning or rezoning” decisions under subdivisions (a)(1) and (a)(6) of regulation 18704.2. Because general plans cover the entire jurisdiction, officials of these agencies believe they cannot participate in such decisions unless the “public generally” or “legally required participation” exceptions apply. This results in substantial difficulties, in that all of the members of a governing board of an agency may be unable to participate in some of the most fundamental decisions affecting the entire jurisdiction. Staff is anticipating regulatory action involving clarification of and refinement to the conflict-of-interest rules as applied to these types of decisions. This project will also include consideration of the “segmentation and bifurcation” procedures referred to in Commission advice letters. The procedure is used when a governmental decision may be “segmented” into a series of decisions in which a public official may have a conflict in one decision in the series but not others.

Regulation 18707.3: Small Cities Public Generally Regulation.

[Second Priority]

Regulation 18707.3 provides an exception geared specifically toward small jurisdictions. Several amendments were made to this regulation to make it consistent with the amended materiality regulations applicable to real property. The City of Yountville has also raised concerns with the application of this regulation in that it incorporates the “500-foot rule” as one of the preconditions for application of the “public generally” exception for small jurisdictions. Basically, when a circle is drawn using a 500 foot radius from the residences of city council members, the resultant areas encompass much of the town. Staff is currently reviewing the regulation to see if language can be tailored to meet this unique concern of small cities.

“Independent Expenditure” (Regs. 18225.7 and 18225.8); § 82031.

[Second Priority]

Regulation 18225.7 defines expenditures “made at the behest of” a candidate, which include coordinated expenditures treated as contributions under the Act. It is anticipated that staff will present for further pre-notice discussion or adoption extensive revision of the current regulation in December 2002, to more clearly and specifically define conduct that constitutes coordination. Another proposed regulation, regulation 18225.8, deals with committees not controlled by candidates. It may be necessary to continue work on this item in 2003.

**Regulation 18991: Selection of Local Candidates and
Controlled Committees for Audit.**

[Second Priority]

The Commission is required to select cities and counties for campaign audits grouped by population. For example, 15 percent of total jurisdictions of 700,000 or more are selected for audit through a random selection process. Under the current regulation, the population size that determines the grouping is based on the most recent decennial federal census. Enforcement staff recommends changing that to require use of the most recent population estimates published by the Department of Finance. These reports are published each May and therefore result in greater

accuracy on population totals. This regulation will be presented for pre-notice discussion in December, but it will be adopted in January of 2003.

**Requested Amendment Regulation 18116: Filing Dates.
August 5, 2002 letter from Colleen C. McAndrews.**

[Second Priority]

An issue concerning filing late contribution reports (“LCRs”) on the weekend arose at the December 2001 meeting during consideration of permanent adoption of Proposition 34 regulations 18539 (online disclosure of contributions) and 18550 (online disclosure of independent expenditures). Regulation 18116 provides that when reports filed under the Act are due on a Saturday, Sunday, or official state holiday, the deadline is changed to the next working day, except for late contribution reports and late independent expenditure reports. The weekend extension applies to the new \$1,000 and \$5,000 reports added by Proposition 34, but does not apply to the traditional late contribution reports. Colleen McAndrews of Bell, McAndrews, Hiltachk and Davidian submitted two letters to the Commission on March 8, 2002, and August 5, 2002, suggesting that the weekend extension be applied to traditional LCRs. Ms. McAndrews suggested that traditional late contribution reports should not be excepted out of the next regular business day extension in regulation 18116. She suggested that weekend 24-hour reporting could be preserved for LCRs on the final weekend before the election, but that prior weekends could be excepted out.

Regulation 18703.3: Disclosure of Incentive Income (*In re Hanko*):.

[Second Priority]

On August 9, 2002, the Commission adopted *In re Hanko* (O-02-88) which held that payments to a hospital district director from her employer will be attributed to a purchaser of her employer’s products where the public official: (1) has been employed to purposefully direct sales or marketing activity toward the purchaser; (2) has is direct contact with the purchaser, intended by the public official to general sales or business; and (3) has a direct relationship between the purchasing activity of the purchaser and the amount of the incentive compensation received by the public official. Where these requirements are met, both the purchaser and the employer are considered sources of income to the official for purposes of sections 87100 and 87103. Consistent with this holding, the Commission directed staff to investigate possible amendment of Commission regulations to require disclosure of incentive income, similar to that currently required under the “commission income” regulation.

III. OTHER REGULAR ITEMS

Annual Technical Clean-up.

[Second Priority]

The Commission considers annually changes to Commission regulations that resulted from the staff’s review for technical and other minor changes.

**IV. OTHER (DEFERRED PROJECTS): THESE ITEMS
WILL NOT BE PLACED ON THE 2003 REGULATION CALENDAR ABSENT
ADDITIONAL STAFF RESOURCES OR OTHER COMPELLING CIRCUMSTANCES**

**Regulations 18450, 18450.1, and 18450.2.
Advertising Disclosure: (§§ 84501-84510)**

[Fourth Priority]

These provisions are surviving provisions added by Proposition 208. The purpose of the advertising disclosure rules is to inform voters of the “big money” behind political advertisements. However, interpretive issues exist with respect to whether advertisements for or against a ballot measure are subject to §§ 84502-84504 or § 84506 (governing independent expenditures), or both. Additional issues that may be clarified by regulation: what types of advertisements are subject to the rules; are there exceptions; clarification of the term “cumulative contributions” as defined in § 84502; the treatment of independent expenditure advertisements under § 84506; the specific content of the disclosure; and under what circumstances a disclosure must be amended.

**Regulations 18741.1; 18746.1: Permanent Ban on
Post-Employment Activities.**

[Third Priority]

This involves proposed amendments to regulation 18741.1, relating to the “permanent ban” on post-employment activities. Under the Political Reform Act, former officials in state government are prohibited from attempting to influence proceedings in which they participated when under governmental employment. (Sections 87401 and 87402.) A former official has “participated” where he or she has had “personal and substantial” involvement in the proceeding. In 1999, the Commission adopted regulation 18741.1 interpreting sections 87401 and 87402. That regulation provides that a supervisor is deemed to have participated in any proceeding which was “pending before” the official’s agency and which was under his or her supervisory authority.

In the *Lucas* Opinion, O-00-157, the Commission interpreted this regulation in the context of a high-level official of the Board of Equalization. In so doing, the Commission concluded that even though the official technically had “supervisory authority” over all employees under his chain of command, the official was not a “supervisor” of those employees within the meaning of the regulation, and therefore, did not participate in audits conducted by the lower-level employees. The Commission distinguished this interpretation with the 1990 Commission interpretation reflected in the *Brown* Advice Letter, No. A-91-033, which applied the ban to the former chief of the Enforcement Division of the Commission.

The Commission instructed staff to amend regulation 18741.1 to reflect this distinction. It is anticipated that other technical changes may also be made to this regulation and regulation 18746.1. However, since the regulatory amendment would be a conforming change (the *Lucas* Opinion has already resolved the issue), this has been placed at a lower priority.

***In re Siegel* (1977) 3 FPPC Ops. 62**

[Third Priority]

On January 15 of this year, representatives of the California League of Cities asked that the Commission consider placing a regulation on the calendar codifying *In re Siegel* (1977) 3 FPPC Ops. 62. *Siegel* provides a test which may result in members of nonprofit organizations being treated as “public officials” under the Act, and generally covers quasi-public/private bodies created by public agencies. The *Siegel* opinion sets forth a four-part test to determine if a corporation is in fact a “local government agency.” The four criteria are:

- (1) Whether the impetus for formation of the corporation originated with a local government agency;
- (2) Whether it is substantially funded by, or its primary source of funds is, a government agency;
- (3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform, and which, in fact, they traditionally have performed; and
- (4) Whether the corporation is treated as a public agency by other statutory provisions.

To date, we have examined each advice letter request as to whether a corporation or a private nonprofit corporation is a “local government agency” (section 82041) on a factual, case-by-case basis using the above criteria to make a determination. If the corporation is found to be a “local government agency,” then the individuals who serve on the board of directors are “public officials” under the Act and are subject to the disclosure and conflict-of-interest provisions of the Act.

Section 82027.5. General Purpose Committees

[Third Priority]

The Act classifies campaign committees according to their purpose and their scope of geographic activity; “state,” “county” or “city.” The filing officer for a committee will vary depending upon this classification. Section 82027.5 defines a local committee as one that is *active only* in that city or county. It is not uncommon for a local committee to make an occasional contribution to a state candidate or measure. If the state contribution is over \$100 it is unclear whether that contribution requires the committee to classify itself as a state committee. For example, a city committee may have a history of making contributions to local candidates but in one year makes a few contributions to state candidates or measures. Since the committee was *not active only* in the city, the committee may file as a state committee, also avoiding a local jurisdiction’s ordinance.

Staff requests that the Commission consider a regulation that clearly defines the city, county and state classifications. Such a regulation may consider the committee’s history and

frequency of making expenditures in a specific jurisdiction and the amount of expenditures made to certain types of candidates and measures.

**Regulation 18234: Amend Treatment of
Revocable Trusts Or Add Alternate Criteria.**

[Fourth Priority]

Michael Martello, City Attorney for the City of Mountain View, requested that the regulation be amended to find that an official can have an economic interest in property held in a trust under certain circumstances, even where the trust is revocable.

**Section 84215: Filing Place - Candidates Holding Office
and Campaigning for Another Office**

[Fourth Priority]

Section 84215 specifies where campaign statements must be filed. When a local candidate runs for state office (or vice versa), he or she must open a separate controlled campaign committee for the new office and in many cases will end up with two committees, one for the local office and one for the state office. Section 84215 requires a state candidate/officeholder, and his or her controlled committees, to file in specified locations. Likewise, a local candidate/officeholder, and his or her controlled committees, must file in the local jurisdiction. Several years ago, staff gave written advice that these committees must file at all of the times and in all of the places where the candidate must file campaign statements. Thus, a candidate's local committee will file with the Secretary of State in addition to the local jurisdiction, and his or her state committee will file with the local jurisdiction in addition to the Secretary of State. Staff recommends that this advice be codified in a regulation.

Valuing Nonmonetary Contributions

[Fourth Priority]

Whenever a candidate or committee receives a nonmonetary contribution or a public official receives a gift, its "fair market value" must be disclosed. (Section 82025.5.) Over the years, many questions have been addressed through opinions and advice letters regarding how certain items should be valued and disclosed. Examples include, items donated to a committee for an auction, and free air transportation provided to a candidate or a public official. Staff recommends codification of the advice in a regulation.

**V. STATUS OF THE TWO SPECIAL PROJECTS
SELECTED BY THE COMMISSION FOR CY 2002**

Enforcement policy review. The Commission requested enforcement policy discussions focusing on a substantive area. In response to that request, the Commission and staff examined issues concerning the enforcement of late contribution reporting requirements, particularly through the Commission's streamlined LCR enforcement program. Emerging from that discussion was a revised streamlined LCR enforcement program. That program is now being implemented.

Status: The Enforcement Division does not anticipate further action on this project in CY2003.

Conflict of Interest Codes/Statements of Economic Interests. To implement the Commission's goals and objectives for the year 2002, in April 2002, staff identified concrete projects in the conflicts/disclosure area for Commission consideration. The Commission selected five proposals for consideration in 2002. The status of each project is discussed in a memorandum provided in the October 2002 Commission Meeting. It is anticipated that action on one or more of these items will continue through December 2002.

Appendix 1: Regulation Calendar

Appendix 2: Staff Memorandum "Pre-notice Discussion on Deadlines for Submitting Documents to the Commission"

Appendix 3: Legislation

Appendix 4: Regulation 18707.5